

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
July 22, 2008 Session

**STATE OF TENNESSEE v. MONQUEZE SUMMERS**

**Appeal from the Criminal Court for Davidson County  
No. 2001-D-2297 J. Randall Wyatt, Jr., Judge**

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**No. M2007-02392-CCA-R3-PC - Filed November 4, 2008**

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The Petitioner, Monqueze Summers, appeals from the Davidson County Criminal Court's order denying his petition for post-conviction relief. He argues that the denial was error because he did not receive the effective assistance of counsel at trial. In the alternative, he asks us to remand his case to the post-conviction court for consideration of allegedly exculpatory evidence discovered after his post-conviction hearing. Following our review of the record and the parties' briefs, we affirm the post-conviction court's denial of the Petitioner's request for relief and deny the Petitioner's motion to remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

J. David Wicker, Jr., Nashville, Tennessee, for the appellant, Monqueze Summers.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

The charges in this case arose from the events surrounding the death of Montrell Mason and the robbery of Clinton Anderson and Christopher Fears on August 13, 1999. See State v. Summers, 159 S.W.3d 586 (Tenn. Crim. App. 2004) (adjudicating the Petitioner's direct appeal), perm. to appeal denied, (Tenn. Jan. 18, 2005). Evidence at trial, though highly controverted, established that the Petitioner, along with three friends named Jarquis Hendricks, Renaldo Clay, and Orlando Bass, robbed the three victims at gunpoint, apparently in retaliation for disrespect shown to the Petitioner

earlier that evening. Id. at 589. At some point while he was being robbed, Mason told Anderson and Fears to get him his gun. Id. at 591. Hendricks testified that the Petitioner shot Mason soon after. Id. Fears, although he had walked out of view, admitted to hearing gunshots within this time frame. Id. Neither the State nor the defense called Bass to testify at trial.

On August 30, 2002, a jury found the Petitioner guilty of felony murder, two counts of aggravated robbery, and one count of unlawful possession of a handgun. The Petitioner was subsequently sentenced to life imprisonment plus ten years. On direct appeal, this Court affirmed his conviction and sentences, holding that the evidence at trial was sufficient to convict him and that the trial court did not err in denying his bid to procure judicial use immunity for a prospective witness, in admitting certain former testimony, in giving jury instructions regarding the mens rea required for a felony murder conviction, and in its consecutive sentencing decision. Id. at 592-600.

On September 6, 2005, the Petitioner timely filed a pro se petition for post-conviction relief. Post-conviction counsel was appointed, and an amended petition filed. The Petitioner argued that his counsel at trial and on appeal (Trial Counsel) was ineffective for a number of reasons, including Trial Counsel's failure to (1) call certain witnesses; (2) adequately discuss the facts of the case with the Petitioner; and (3) argue on appeal that the trial court erred by admitting certain photographs into evidence.

A post-conviction hearing was held on August 21, 2007. Jim Todd, the Assistant District Attorney who prosecuted the Petitioner, testified that Hendricks, Clay, Bass, and the Petitioner were all originally to be tried together, but he severed Hendricks and Clay as a result of their agreement to testify against the Petitioner. Todd chose not to sever Bass because he did not find Bass' version of the events credible.<sup>1</sup> Todd also testified that he believed Bass "never talked," that he could not remember whether or not he had participated in an April 12, 2002 meeting with Bass, and, as such, that he could not remember Bass making statements exculpating the Petitioner at that meeting. Trial Counsel also testified at the hearing, stating that he never had knowledge of any exculpatory statements made by Bass and that he did not remember specifically why he chose not to call Bass as a witness.

The Petitioner testified that Bass, had he been called to testify at trial, would have exculpated the Petitioner by testifying that someone else fired the shots that killed Mason. Bass did not testify at the post-conviction hearing. Finding the Petitioner's evidence insufficient to support his claims, the post-conviction court denied relief. Both of the issues in this appeal of that denial revolve solely around the Petitioner's contention that Bass would have offered exculpatory testimony had Trial Counsel called him as a witness at trial.

### **Analysis**

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-

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<sup>1</sup>The district attorney's office later dismissed charges against Bass after one of its witnesses became unavailable.

30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

### **I. Ineffective Assistance of Counsel**

The Petitioner alleges that he received ineffective assistance of counsel because Trial Counsel failed to call Bass as a witness. The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo

standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

“When a petitioner contends that trial counsel failed to . . . present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.”

Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Regardless of whether a petitioner’s trial counsel was deficient, he is “not entitled to relief on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called.” Id. at 758. Here, the Petitioner did not call Bass to testify at the post-conviction hearing; the post-conviction court thus had no evidence before it supporting the Petitioner’s claims that Bass would have exculpated him. We accordingly affirm the post-conviction court’s finding that the Petitioner failed to prove his factual allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f).

## **II. Motion to Remand**

In the alternative, the Petitioner requests that we remand this case to the post-conviction court for further findings. He bases this request on his post-conviction counsel’s discovery, after the post-conviction hearing, of a copy of a letter from Todd to Trial Counsel sent April 23, 2002, discussing statements Bass made to Todd at the April 12, 2002 meeting and alluded to at the post-conviction hearing. The Petitioner argues that these statements corroborate his claims that Bass would have exculpated him and asks that we remand the case to allow the post-conviction court to consider the letter.

The letter, which the Petitioner attached to his motion to remand, references no obviously exculpatory statements, and the Petitioner does not explain why he believes the statements described therein support his innocence.

The letter referenced by Petitioner would perhaps have been admissible at the post-conviction hearing if offered to impeach Todd or to refresh his recollection regarding his statement that Bass never talked. See Tenn. R. Evid. 612, 613(a). It could have also been admissible to refresh Trial Counsel’s recollection of any evidence received from Todd or to impeach Trial Counsel to the extent the letter is inconsistent with his testimony that he had no knowledge of Bass making any exculpatory statements. Id.

If offered for the truth of the statements contained in the letter, Bass' statements as recorded in the letter would appear to be hearsay not within any exception, however. See Tenn. R. Evid. 801-804. Those statements would, as a result, be inadmissible, and the post-conviction court would be unable to consider them as substantive evidence if we were to remand. Tenn. R. Evid. 802. Inadmissible statements, of course, cannot provide the "critical evidence" the law requires a petitioner alleging ineffective assistance of counsel to produce at an evidentiary hearing. See Black, 794 S.W.2d at 757.

The Petitioner argues that Michael Russo v. State, No. M2000-00919-CCA-R3-PC, 2001 WL 605156 (Tenn. Crim. App., Nashville, June 5, 2001), supports his argument for remand. The Petitioner notes that, in Russo, this Court remanded for further findings because relevant evidence was discovered by counsel for the Russo petitioner after his post-conviction hearing. Id. at \*6. In Russo, however, the evidence in question (photographs) was both relevant and admissible. See id. The evidence here, although arguably relevant, is not admissible. Also, the Russo petitioner argued that his trial counsel prejudiced him by failing to introduce certain photographs; he did not argue that his trial counsel erred by failing to call a witness. The Russo petitioner simply did not engage the Black standard.<sup>2</sup> As a result, this case is distinguishable. We accordingly deny the Petitioner's motion to remand his case to the post-conviction court for further findings.

### **Conclusion**

For the reasons stated above, we affirm the post-conviction court's dismissal of the Petitioner's request for post-conviction relief and deny the Petitioner's motion to remand.

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DAVID H. WELLES, JUDGE

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<sup>2</sup>By denying the Petitioner's remand request on admissibility grounds, we do not suggest that remand would necessarily be proper if the statements contained in the letter were admissible. The question would remain whether the statements constitute evidence of what Bass would have said at trial, still a difficult burden given the "general rule" that presentation of a witness at the post-conviction hearing is the "only way" a petitioner can establish what a witness' trial testimony would have been. Black, 794 S.W.2d at 757.